

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
AIKEN DIVISION

Justin Tyler Herring,	)	
	)	C/A No. 1:20-cv-02909-MBS
Plaintiff,	)	
	)	
v.	)	
	)	<b>ORDER</b>
South Carolina Department of Corrections,	)	
Associate Warden Gary Leamon,	)	
Turbeville Correctional Institution,	)	
	)	
Defendants.	)	
	)	

Plaintiff Justin Tyler Herring is a prisoner in custody of Defendant South Carolina Department of Correction (“SCDC”) and is currently housed at Allendale Correctional Institution in Fairfax, South Carolina. Plaintiff brings this action pro se pursuant to 42 U.S.C. § 1983, for the alleged violation of his civil rights. In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Shiva V. Hodges for pretrial handling. This matter is now before the court for review of the Magistrate Judge’s Report and Recommendation.

**BACKGROUND**

On August 10, 2020, Plaintiff filed a complaint alleging that he was the victim of a sexual assault while he was housed at Defendant Turbeville Correctional Institution (“TCI”), and that upon reporting the attack to Defendant Associate Warden Gary Leamon, the Prison Rape Elimination Act (“PREA”) coordinator at TCI, Defendant Leamon failed to take action within 24 hours of the report. ECF No. 1. Plaintiff alleges he suffered physical and mental injuries and was sent to the hospital. He seeks \$200,000 in damages.

Pursuant to a review of the complaint under 28 U.S.C. § 1915, the Magistrate Judge identified several pleading deficiencies. ECF No. 7. She advised Plaintiff that PREA provides no private cause of action; she set forth the elements that Plaintiff must allege to state a failure to protect claim; and she explained that liability for monetary damages under section 1983 does not extend to either SCDC or TCI because they are not considered “persons.” ECF No. 7. The Magistrate Judge advised Plaintiff that he may attempt to cure the identified defects by filing an amended complaint on or before September 4, 2020, and that failure to do so would result in the court summarily dismissing the complaint without prejudice. ECF No. 7 at 5.

Plaintiff failed to file an amended complaint by the deadline and, on September 8, 2020, the Magistrate Judge issued a Report and Recommendation finding that the complaint is subject to summary dismissal under 28 U.S.C. § 1915(e) and subject to dismissal for failure to prosecute. ECF No. 10. Pursuant to *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005), the Magistrate Judge advised Plaintiff of his right to file an objection to the Report and Recommendation. ECF No. 10 at 8. Plaintiff has not filed an objection to the Report and Recommendation and the deadline for doing so has expired.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight and the responsibility for making a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The court reviews de novo only those portions of a magistrate judge’s report and recommendation to which specific objections are filed and reviews those portions which are not objected to—including those portions to which only “general and conclusory” objections have been made—for clear error. *Diamond*, 416 F. 3d at 315; *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983); *Opriano v. Johnson*, 687 F.2d 44, 77 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the

recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

Notwithstanding Plaintiff's failure to object, the court has thoroughly reviewed the record. The court agrees with the Magistrate Judge that Plaintiff's claims against Defendants are subject to summary dismissal and incorporates the Report and Recommendation, ECF No. 10, herein by reference. Accordingly, the court adopts the Report and Recommendation and dismisses this action without prejudice and without issuance and service of process.

**IT IS SO ORDERED.**

/s/Margaret B. Seymour  
Margaret B. Seymour  
Senior United States District Judge

Dated: October 7, 2020  
Columbia, South Carolina